No. 84507

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IN THE
MISSOURI SUPREME COURT

_____

STATE OF MISSOURI,

Respondent,

v.

GARY LYNN BAKER,

Appellant.

_____

Appeal from the Circuit Court of St. Clair County, Missouri
The Honorable William J. Roberts, Judge

_____

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for creation of a controlled substance, ' 195.420, RSMo 2000, obtained in the Circuit Court of St. Clair County, and for which appellant was sentenced to a prison term of twenty years. The Missouri Court of Appeals, Southern District, affirmed appellant=s conviction and sentence. ***State v. Baker***, No. SD24189 (Mo.App.S.D., April 17, 2002). It denied appellant=s motion for rehearing on May 9, 2002.

This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. On June 25, 2002, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this Court now has jurisdiction of this appeal pursuant to Article V, ' 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Gary Lynn Baker, was charged by information in Henry County with creation of a controlled substance, in that he possessed methanol, hydrogen peroxide, lighter fluid, naphtha, muriatic acid and other solvents proven to be precursor ingredients of methamphetamine, with the intent to create methamphetamine (LF 1, 7). An amended information was filed, charging appellant as a prior and persistent offender (LF 3, 7). At appellant=s request, venue was changed to St. Clair County (LF 8, 11; Tr. 12-13). A second amended information was filed, charging that appellant knowingly possessed methanol or hydrogen peroxide or lighter fluid or naphtha or muriatic acid or pseudoephedrine or ephedrine or acetone and other solvents proven to be precursor ingredients of methamphetamine (LF 12; Tr. 155-156). On February 15[1], 2001, this cause went to trial before a jury in the Circuit Court of St. Clair County, the Honorable William J. Roberts presiding (LF 8).

Viewed in the light most favorable to the verdict, the evidence adduced at trial showed the following:

Amy Huber, an officer assigned to the South Central Drug Task Force, learned that appellant had purchased a large amount of matches from a store in Clinton, Missouri (Tr. 201). The striker plates on match books are a source of red phosphorous which is used to produce methamphetamine. A search

[1]The jury was selected on December 12, 2000, but not sworn until February 15, 2001, due to delays for illness and inclement weather (Tr. 150, 167, 171).

warrant for appellant=s residence was obtained and served at about 10 p.m. on March 10, 2000 (Tr. 204-205). The building used to be a restaurant but had been converted into a residence (Tr. 204).

Bruce Houston was a member of the Special Emergency Response (SER) team which served the search warrant on appellant=s residence on Highway 13 (Tr. 278-279). The job of the SER team was to secure the premises (Tr. 296). Local law enforcement officials conducted the actual search pursuant to the warrant (Tr. 296-297). Houston had a battering ram which he tried to use on the locked metal door on the south side of the building (Tr. 279, 280). Houston shouted Ahighway patrol@ as he hit the door with the battering ram (Tr. 280). Houston could not get the door open, so he broke out the glass and went through the window instead (Tr. 279). Houston opened the door and let the officers in, and they began searching the residence for people (Tr. 280). Houston and his team searched the upstairs while another team searched the downstairs (Tr. 282-283). The downstairs team found two people, one of whom was Vicki Gary, who owned the residence (Tr. 283).

Upstairs, the officers found what appeared to be a large bedroom with another room off to the side (Tr. 283). The lights were on (Tr. 283). The officers believed that appellant was there but could not find him (Tr. 283). Houston noticed what appeared to be a cubbyhole covered up on the ceiling with rungs sticking out of the wall, leading up to the hole (Tr. 284). Next to these rungs was a hot plate that was on and an open can of acetone beside it (Tr. 284). Houston noticed that one of the rungs was broken and that the cubbyhole cover was not squarely on and thought that perhaps that was where appellant was hiding (Tr. 285).

The officers decided to stick a mirror up in the cubbyhole to determine if appellant was there, but while they were waiting for a mirror to be brought from the equipment truck, which was a few miles a way,

Houston tried to talk to appellant, assuming he was in the cubbyhole (Tr. 288). Houston said, "Gary, we know you're up there. You need to come down. If you don't come down, we'll have to come and get you. And that could be bad." (Tr. 288). Houston said that they would have to put gas up there if appellant did not come down and told him that Vicki had already told them that he was up there (Tr. 289). When the mirror arrived, the officers threw a lighting device[2] in the hole, at which point appellant said, "Okay, okay, I'm here." (Tr. 289). Eventually, the officers talked him into coming down (Tr. 289-290). Appellant was handcuffed and taken to the jail (Tr. 290).

Once the residence had been secured, James Wingo, a sergeant with the Missouri Highway Patrol, checked to make sure it was safe for the other officers to come in and then commenced the search (Tr. 314, 319, 321). The officers discovered numerous ingredients and pieces of equipment used for making methamphetamine.

To make methamphetamine, pseudoephedrine pills are pulverized and placed in a jar along with a solvent which dissolves the ephedrine. The clear liquid containing ephedrine is then removed, placed in a shallow pan, and heated (Tr. 326). The liquid evaporates, leaving behind a white crusty powder **B** ephedrine (Tr. 326). The ephedrine is then cooked with hydriodic acid, which is made by combining red phosphorus, which can be obtained from the strike plates of matchbooks or from road flares, with iodine crystals and water (Tr. 327-328). The resulting solution is then poured through coffee filters, filtering out

[2]It was described as "those little white things, little green things; shake 'em up; break 'em and they glow for 30 minutes." (Tr. 289).

the red phosphorus and leaving methamphetamine hydrolyte (Tr. 330). Ice and sodium hydroxide (lye) are added to reduce the acidity, and then a solvent such as Coleman fuel, ether, or naphtha is added (Tr. 331). The methamphetamine attaches to the solvent (Tr. 331). The organic solvent is drawn off with a baster, and then hydrogen chloride gas, which is made by adding sulphuric, muriatic, or hydrochloric acids to table salt, is bubbled through the solvent solution, causing methamphetamine to fall to the bottom of the jar (Tr. 332). This is then poured through coffee filters, leaving methamphetamine in the coffee filters (Tr. 332). Acetone may be added to remove any residual moisture from the powder (Tr. 332).

The officers found the following items in the upstairs room: a small glass jar with a white powder and liquid solution which later tests proved to contain pseudoephedrine (Tr. 323), a bottle of ephedrine pills (Tr. 335), a bottle of pseudoephedrine pills, labeled as ibuprofen (Tr. 335), a bag of matchbook strike plates (Tr. 336), a bottle of Heet, a pocket propane torch, a razor blade, a plastic bag, and butane (Tr. 323, 336), two bottles of Coleman propane and a bottle of muriatic acid, two bottles of Red Devil lye, triple beam scales, which are often used to measure grams of drugs, a bottle of Vitablend, which is often used as a cutting agent, several very small Ziploc bags (Tr. 338-340, 346, 350), funnel filters, plastic disposable gloves (Tr. 340), and a small glass bottle of acid in a small refrigerator (Tr. 341). There was also a skillet lid and funnels (Tr. 323), a can of butane (Tr. 323), an electric skillet, pyrex glassware, a metal funnel, a mason jar, and plastic tubing (Tr. 324, 344, 347). A microwave was also present; these are often used for the evaporation of solvents and liquids (Tr. 324). Two light bulbs consistent with the use of smoking methamphetamine were found: the end is drilled out of a regular light bulb and a hole is burned in the glass end of a light bulb (Tr. 346). A small amount of methamphetamine is placed in the bulb and then heated up with a pocket torch (Tr. 346-347). The methamphetamine smoke is then inhaled (Tr. 347).

Mens clothing and an envelope addressed to appellant at that address were also found in the upstairs portion of the structure (Tr. 351). Officers also found a Walmart receipt from February 24, 2000 for four packages of pseudoephedrine (Tr. 353). In short, the officers found pseudoephedrine, lye, methanol, naphtha, match strike plates, sulphuric acid, muriatic acid, iodine, salt, distilled water, acetone, hydrogen peroxide, ephedrine, lighter fluid, an electric skillet, a hot plate, filters, and funnels, and all of these ingredients and equipment could be used for the manufacture of methamphetamine (Tr. 358-359). The officers also found a shotgun, rifle and pistol ammunition, and bows and arrows upstairs (Tr. 287).

Downstairs were found four large bottles of hydrogen peroxide (Tr. 338), a can of acetone (Tr. 344), a bottle of muriatic acid (Tr. 345, 347), two bottles of Red Devil lye, sodium hydroxide, and a bottle of iodine tincture (Tr. 346), and an AKS rifle and empty holster with .44 magnum ammunition, which were downstairs behind the door (Tr. 287). Ofc. Huber searched Vicki Gary, who was also present at the residence, and found a small container containing a white powdery substance which was later determined to be methamphetamine (Tr. 210-212).

Sarah Brewer, who knew appellant, said that appellant had knowledge of drugs, particularly of methamphetamine (Tr. 261). Appellant told Brewer he knew how to make methamphetamine (Tr. 261).

Appellant declined to testify in his own defense and presented no other evidence (Tr. 433-435). At the close of evidence, instructions, and argument by counsel, the jury found appellant guilty of possession of a chemical with the intent to create a controlled substance (LF 23, 32; Tr. 479). The court found appellant to be a prior and persistent offender (LF 9; Tr. 97-98). The trial court sentenced appellant to a term of twenty years in the Department of Corrections (LF 27-28; Tr. 510).

The Missouri Court of Appeals, Southern District, affirmed appellant=s conviction and sentence. ***State v. Baker***, No. SD24189 (Mo.App.S.D., April 17, 2002). It denied appellant=s motion for rehearing on May 9, 2002. On June 25, 2002, pursuant to Supreme Court Rules 30.27 and 83.04, this Court granted appellant=s motion to transfer the case to this Court.

ARGUMENT

I.

APPELLANT=S CLAIM THAT THE TRIAL COURT ERRED IN ADMITTING EVIDENCE SEIZED FROM APPELLANT=S RESIDENCE IS AFFIRMATIVELY WAIVED BECAUSE APPELLANT STATED ANO OBJECTION@ WHEN THE EVIDENCE WAS OFFERED AT TRIAL. APPELLANT FURTHER WAIVED THIS CLAIM BY NOT TIMELY ASSERTING THAT THE POLICE ALLEGEDLY ENGAGED IN AN ILLEGAL ANO-KNOCK@ SEARCH UNTIL AFTER THE HEARING ON THE MOTION TO SUPPRESS. IN ANY EVENT, THE TRIAL COURT DID NOT ERR, PLAINLY OR OTHERWISE, IN ADMITTING INTO EVIDENCE CHEMICALS, EQUIPMENT AND OTHER ITEMS SEIZED FROM APPELLANT=S RESIDENCE BECAUSE THIS EVIDENCE WAS NOT THE RESULT OF AN ALLEGEDLY ILLEGAL ANO-KNOCK@ SEARCH IN THAT EXIGENT CIRCUMSTANCES EXISTED TO JUSTIFY THE ANO-KNOCK@ SEARCH.

Appellant contends that the trial court should have suppressed the evidence seized from his residence because it was the fruit of an illegal seizure in that the officers executing the search warrant allegedly did so illegally in that they made a no-knock entry of his residence but had not demonstrated circumstances which would justify the need for a no-knock entry.

A. Facts

James Wingo, a sergeant with the Highway Patrol with eleven years of experience as a narcotics investigator with the Division of Drug and Crime Control, prepared the application for search warrant in the present case (Tr. 22). Wingo presented the application to Judge Strothmann at 8:55 p.m. on March 10, 2000 (Tr. 29). Judge Strothmann issued the warrant based on the application and Wingo=s testimony (Tr. 30). The warrant was executed on appellant=s residence around 10:30 p.m. that same night (Tr. 38). To execute the search warrant, members of the Special Emergency Response team were enlisted to first secure the premises prior to local officers commencing the actual search (Tr. 296). Bruce Houston, a member of the SER team, was the first to gain entry to the house. Houston had a battering ram which he tried to use on the locked metal door on the south side of the building on the second story addition which was accessed by an outside stairway (Tr. 40, 279, 280). Houston shouted Ahighway patrol@ as he hit the door with the battering ram (Tr. 280). Houston could not get the door open, however, so he broke out the glass and went through the window instead (Tr. 279). Houston opened the door and let the officers in, and they began searching the residence for people (Tr. 280). Houston and his team searched the upstairs while another team searched the downstairs (Tr. 282-283).

Once the residence had been secured, James Wingo, a sergeant with the Missouri Highway Patrol, checked to make sure it was safe for the other officers to come in and then commenced the search pursuant to the warrant (Tr. 314, 319, 321). In executing the search warrant, Wingo discovered pseudoephedrine, matches, strike plates containing red phosphorous, several bottles of Heet, several bottles of hydrogen peroxide, several organic solvent cans and bottles, including naphtha, and muriatic acid (Tr. 32). All of those items are used to manufacture methamphetamine (Tr. 33). There was a methamphetamine lab set up

at the house, but it was not currently cooking any methamphetamine (Tr. 34). There was a jar of liquid and powder where pseudoephedrine was being extracted from pills (Tr. 34).

Appellant filed a motion to suppress physical evidence which asserted, among other things, AThat the warrant was illegally executed by law enforcement officers.@ (LF 5-6). The motion did not further specify how or why the warrant was allegedly illegally executed. A hearing was held on appellant=s motion to suppress, but no evidence was adduced by either side to suggest that the police did not knock and announce before gaining access to the building. Sgt. Wingo testified that he did not know if anyone attempted to knock on the door before entering the house as he was not present at the time officers actually entered the house (Tr. 39). Sgt. Wingo testified that the police entered through two separate doors, and that the police had to forcibly open the door at the top of the outside stairway that led to the second floor (Tr. 40). Sgt. Wingo also testified that he was in fear of bodily harm from executing the search warrant in light of appellant=s Aviolent, erratic, paranoid behavior@ that had been apparent in past contacts between appellant and law enforcement (Tr. 77). Wingo also testified that appellant had brandished weapons to citizens (Tr. 78). At the close of evidence, appellant argued that the search was improper because some of the information in the affidavit supporting the search warrant was allegedly stale and that there was a lack of probable cause (Tr. 87- 95). Appellant also argued that the warrant was unlawfully executed in that the search was not done in daylight (Tr. 91-92, 94). Appellant did not argue that the warrant was unlawfully executed because the officers failed to knock and announce, nor was there any such evidence at the hearing. The trial court overruled appellant=s motion (Tr. 95).

Immediately prior to trial, appellant renewed his motion to suppress evidence, asking the court to Areopen it and reconsider@ it (Tr. 159). Appellant again argued a lack of probable cause, but also argued

for the first time that the execution of the search warrant was improper because it was done without knocking or announcing before entering the premises (Tr. 162). Appellant argued that the state had not proven whether the officers who gained entry to the house knocked or announced or not (Tr. 162). Appellant also argued that the search warrant allegedly Adid not allow@[3] the officers not to knock and announce before entering and that there were no circumstances presented at the scene that would have justified a reason not to knock and announce (Tr. 163).

The court considered the arguments and the search warrant and the supporting affidavit (Tr. 160-161), and again denied appellant=s motion to suppress (Tr. 164). Appellant then discussed with the court whether it could have a continuing objection to the evidence, and the court, prosecutor, and defense counsel agreed that appellant would object at the first instance of the state referring to the evidence seized and that appellant would then ask for a continuing objection at that time, which the court would grant (Tr. 164-166). Such a continuing objection was made during the state=s opening statement when the prosecutor began to describe the property seized in the search (Tr. 175-176). However, when the evidence was offered for admittance at trial, appellant announced that he had Ano objection@ to any of it (Tr. 286, 349-350, 351, 353).

[3]Appellant also argued that the warrant did not allow a night time search (Tr. 163), but this was not the case as the warrant did say that the officers could search the premises Aby day or night@ (LF 15).

B. Appellant has affirmatively waived his claim.

Appellant claims that the trial court erred in admitting evidence seized in the search of his residence. However, while appellant initially made a continuing objection during opening statements to the evidence in question, he affirmatively waived his claim by announcing Ano objection@ to all of the evidence when it was introduced at trial (Tr. 286, 349-350, 351-353). An announcement of Ano objection@ amounts to an affirmative waiver of appellate review of the issue. ***State v. Burge***, 39 S.W.3d 497, 499 (Mo.App.S.D. 2000). ***See also State v. Starr***, 492 S.W.2d 795, 801 (Mo.banc 1973); ***State v. Simone***, 416 S.W.2d 96, 100-101 (Mo.1967); ***State v. Holt***, 415 S.W.2d 751, 765 (Mo. 1967); ***State v. Markham***, 63 S.W.3d 701, 707 (Mo.App.S.D. 2002); ***State v. Patino***, 12 S.W.3d 733, 740 (Mo.App.S.D. 1999); ***State v. Morrow***, 996 S.W.2d 679, 682 (Mo.App.W.D. 1999); ***State v. Cardona-Rivera***, 975 S.W.2d 200, 203 (Mo.App.S.D. 1998); ***State v. Atchison***, 950 S.W.2d 649, 654 (Mo.App.S.D. 1997); ***State v. Stevens***, 949 S.W.2d 257, 258-259 (Mo.App.S.D. 1997); ***State v. Rush***, 949 S.W.2d 251, 257 (Mo.App.S.D. 1997); ***State v. Weston***, 912 S.W.2d 96, 101 (Mo.App.S.D. 1995); ***State v. McBane***, 904 S.W.2d 548, 551 (Mo.App.W.D. 1995); ***State v. Funke***, 903 S.W.2d 240, 244 (Mo.App.E.D. 1995); ***State v. Zelinger***, 873 S.W.2d 656, 660 (Mo.App.S.D. 1994); ***State v. Scott***, 858 S.W.2d 282, 285 (Mo.App.W.D. 1993); ***State v. Anthony***, 837 S.W.2d 941, 944 (Mo.App.E.D. 1992); ***State v. Daly***, 798 S.W.2d 725, 729 (Mo.App.W.D. 1990); ***State v. Bolden***, 799 S.W.2d 122, 123 (Mo.App.W.D. 1990); ***State v. Meyers***, 770 S.W.2d 312, 314 (Mo.App.W.D. 1989); ***State v. Ealey***, 727 S.W.2d 165, 167 (Mo.App.W.D. 1987); ***State v. Adams***, 552 S.W.2d 53 (Mo.App.K.C.D. 1977); ***State v. Day***, 531 S.W.2d 780, 782 (Mo.App.K.C.D. 1975); ***State v. Hunter***, 530 S.W.2d 432, 433 (Mo.App.K.C.D. 1975).

Appellant has not filed a substitute appellate brief in this matter. However, in his reply brief below (and in his motion for transfer to this Court), he cites to ***State v. Stillman***, 938 S.W.2d 287 (Mo.App.W.D. 1997), wherein the Court of Appeals, Western District, reviewed the defendant=s claim despite the fact that counsel had said Ano objection@ when the evidence came in. As in the present case, the attorney in ***Stillman*** had raised the issue in a pretrial hearing and had renewed the objection during the testimony of the witnesses in question, but when the exhibits were actually offered into evidence, defense counsel said Ano objection.@ ***Id.*** at 289-290. The Court of Appeals, Western District, acknowledged that the Aestablished rule in Missouri holds that stating >no objection= when evidence is introduced constitutes an affirmative waiver of appellate review of the issue.@ ***Id.*** (citations omitted). The Court of Appeals, Western District, however, decided that the trial court and opposing counsel understood that defense counsel did not mean to waive the record he had made on the motion to suppress and that to then find a waiver and deny review would be a Ahypertechnical application@ of the requirement of renewing the objection at every stage.

Appellant, in his motion for transfer to this case, also cites to ***State v. Curtis***, 931 S.W.2d 493 (Mo.App. 1996), on which ***Stillman*** relied. In ***Curtis***, defendant had raised a motion to suppress and asked for a continuing objection prior to trial, yet announced Ano objection@ when the drugs at issue were offered into evidence. ***Id.*** at 494-495. Again, the Court of Appeals, Western District, decided that Athe trial court and opposing counsel understood that counsel did not intend to waive@ the record made on the motion to suppress and thus reviewed the defendant=s claim on direct appeal. ***Id.*** at 495.

In his transfer motion, appellant also cites to this Court=s decision in ***State v. Wurtzburger,*** 40 S.W.3d 893 (Mo.banc 2001), which appellant says Aquestion[s] the concept of waiver of plain error

review.@ (Transfer Mot. at 1, 5). In ***Wurtzburger***, defense counsel not only failed to object to an instruction, but specifically told the court that he had no objection to the instruction in question. ***Id.*** at 897. The state argued that the defendant had waived all appellate review and that the Supreme Court was precluded from performing even plain error review, citing Rule 28.03 which requires counsel to make specific objections to instructions and states that no one may assign error regarding an instruction unless the party objects to the instruction before the jury retires. ***Id.*** at 897. This Court ultimately held that Rule 28.03 did not trump Rule 30.20, which allowed for plain error review, and thus this Court reviewed the defendant=s claim for plain error.

First of all, with reference to the Western District cases, ***Stillman*** and ***Curtis***, neither of these cases purports to overrule the longstanding rule that stating Ano objection@ constitutes a waiver. Indeed, the Court in ***Stillman*** expressly acknowledged that A[t]he established rule in Missouri holds that stating >no objection= when evidence is introduced constitutes an affirmative waiver of appellate review of the issue.@ ***Id.*** at 290 (citations omitted). Moreover, the Western District, since deciding both ***Stillman*** and ***Curtis,*** has found a waiver where a defendant has stated Ano objection@ when the evidence in question was offered. ***See State v. Morrow***, 996 S.W.2d 679, 682 (Mo.App.W.D. 1999).

As for ***State v. Wurtzberger,*** this Court addressed itself to the question of whether Rule 28.03, which requires a specific objection to an instruction to preserve the claim for appellate review, trumped Rule 30.20 and *precluded* an appellate court from granting even plain error review. ***Id.*** at 897-898. ***Wurtzburger*** did not address the issue of what effect an announcement of Ano objection@ had as to appellate review. Moreover, ***Wurtzburger*** found the state was correct that the defendant had waived appellate review when his counsel failed to raise a specific objection. ***Id.*** at 898.

Thus, there is no question that stating Ano objection@ amounts to a waiver of appellate review and none of appellant=s cases cited in his transfer motion contradict this principle of law. The fact that the ***Stillman*** and ***Curtis*** courts reviewed defendant=s claim on appeal anyway does not mean there was not a waiver; it merely means that the Western District chose to exercise its discretion and review despite the waiver although, as will be discussed immediately below, no plain error could possibly be found.

Neither ***Stillman***, nor ***Curtis***, nor ***Wurtzburger*** *mandate* that a court grant plain error review where a defendant has affirmatively waived his claim by stating Ano objection.@ Indeed, completely aside from the question of whether an issue was affirmatively waived or not, the fact remains that granting plain error review is always discretionary with the appellate court and need not be granted. "The 'plain error' rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." ***State v. Roberts***, 948 S.W.2d 577, 592 (Mo.banc 1997), *cert. denied,* 118 S.Ct. 711 (1998). "'[U]nless a claim of plain error facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted,' this Court will decline to exercise its discretion to review for plain error under Rule 30.20." ***Id., citing State v. Brown***, 902 S.W.2d 278, 284 (Mo.banc 1995), *cert. denied*, 516 U.S. 1031 (1995). Where a defendant has stated affirmatively on the record that he has Ano objection@ to the evidence, one would be hard put to state that the record Afacially establishes substantial grounds for believing manifest injustice of miscarriage of justice has resulted.@ Thus, even if an appellate court were to grant plain error review, actual plain error would not have resulted from the trial court doing as the defendant wished.

The bottom line is that if a defendant states Ano objection@ to evidence when it is offered, this constitutes a waiver of appellate review. Appellant=s cases do not say anything to the contrary. This waiver

is sufficient grounds for an appellate court to decline reviewing the defendant=s claim, even for plain error, just as it is within the appellate court=s discretion to review the claim despite the waiver and affirm a conviction. In the present case, the appellate court declined to review the claim. Grounds existed to decline review in light of the fact that appellant had waived appellate review. Thus, the appellate court was well within its discretion to decline review.

C. Appellant further waived his claim by not raising it in a timely fashion.

Even if appellant had not affirmatively waived his claim by stating Ano objection,@ he failed to preserve it by not raising his claim in timely fashion to the trial court. Appellant=s motion to suppress made no specific allegation that the police failed to knock and announce their presence prior to making entry to the building, but instead made a simple boilerplate allegation that the warrant was not lawfully executed (LF 5). One of the purposes of raising claims in a pretrial motion to suppress is to give the state a fair chance to respond and the trial court a fair opportunity to rule; it also prevents sandbagging. ***State v. Galazin***, 58 S.W.3d 500, 505 (Mo.banc 2001). In ***Galazin***, the defendant waited until trial to claim that his arrest was invalid because the officer allegedly did not have power to arrest outside his jurisdiction. ***Id.*** at 502-503. Similarly, in the present case, appellant did not specifically raise a claim that the officers did not knock and announce until after the close of the motion to suppress hearing and immediately prior to commencement of the trial. Then, when the state tried to present such evidence during the trial, appellant successfully objected to the evidence (Tr. 281-282). Appellant should not be allowed to benefit from such sandbagging techniques. Just as in ***Galazin***, where the burden was on the defendant to show the illegality of the police conduct, so in the present case, the burden is on appellant to show that the police did not have grounds to make a no-knock search of appellant=s residence.

At the very least, because appellant failed to timely raise this issue in his motion to suppress, he has not preserved this issue for appeal and is entitled to only plain error review. ***State v. Conn*** 950 S.W.2d 535, 537 (Mo.App.E.D. 1997) (reviewing only for plain error where defendant raised motion to suppress, but not as to specific person to whom statements were made). "The 'plain error' rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." ***State v. Roberts***, 948 S.W.2d 577, 592 (Mo.banc 1997), *cert. denied*, 118 S.Ct. 711 (1998). Appellant must demonstrate that manifest injustice or a miscarriage of justice will occur if the error is not corrected. ***Id.*** "'[U]nless a claim of plain error facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted,' this Court will decline to exercise its discretion to review for plain error under Rule 30.20." ***Id., citing State v. Brown***, 902 S.W.2d 278, 284 (Mo.banc 1995), *cert. denied*, 516 U.S. 1031 (1995).

"Relief under the plain error standard is granted only when an alleged error so substantially affects a defendant's rights that a manifest injustice or miscarriage of justice inexorably results if left uncorrected. Appellate courts use the plain error rule sparingly and limit its application to those cases where there is a strong, clear demonstration of manifest injustice or miscarriage of justice. The determination of whether plain error exists must be based on a consideration of the facts and circumstances of each case. A defendant bears the burden of demonstrating manifest injustice or miscarriage of justice." ***State v. Varvera***, 897 S.W.2d 198, 201 (Mo.App., S.D. 1995) (citations omitted).

"Review of a ruling on a motion to suppress is limited to a determination of whether sufficient evidence exists to sustain the ruling." ***State v. Solt***, 48 S.W.3d 677, 678-679 (Mo.App.S.D. 2001). "If the trial court=s ruling is plausible in light of the record, the court on appeal is to affirm even though it is

convinced that had it been sitting as the trier of fact it would have reached a different result. ***Id.*** at 679. "Deference is given to the trial court=s evaluation of the credibility of the witnesses and the weight of the evidence." ***Id.*** The reviewing court considers the facts and reasonable inferences therefrom in the light most favorable to the trial court=s decision and reverses only if the trial court=s decision was clearly erroneous. ***Id.***

D. The no-knock search was warranted under the exigent circumstances of the case.

To begin, it can hardly be said that the trial court=s decision to allow the evidence in was clearly erroneous, let alone plain error, when appellant said he had Ano objection@ to the evidence. In any event, appellant contends that the trial court erred in overruling his motion to suppress in that the state overstepped constitutional bounds by conducting a no-knock search. The common law knock and announce principle is a part of the reasonableness inquiry under the Fourth Amendment of the United States Constitution.[4] ***Wilson v. Arkansas***, 1514 U.S. 927, 15 S.Ct. 1914, 1915, 131 L.Ed.2d 976 (1995). The method of entry into a residence, even with a search warrant, may render the subsequent search and seizure violative of the Fourth Amendment. ***Id.*** at 1918. There is no rigid rule, however, and in some circumstances,

[4]Analysis of search and seizure questions under Missouri law is identical to an analysis of search and seizure questions under the Fourth Amendment of the U.S. Constitution. ***State v. Damask***, 936 S.W.2d 565, 570 (Mo.banc 1996).

unannounced entry may be justified when, for example, there is a threat of violence or a risk that evidence would likely be destroyed. ***Id.***

In order to justify a Ano knock@ entry, police must have a reasonable suspicion that knocking and announcing their presence would be dangerous or futile or that it would allow for the destruction of evidence. ***Richards v. Wisconsin***, 520 U.S. 385, 117 S.Ct. 1415, 1421, 137 L.Ed.2d 615 (1997). This showing is not high, but police should be required to make it whenever the reasonableness of a no-knock entry is challenged. ***Richards***, 117 S.Ct. at 1422.

In the present case, there was no evidence presented at the motion to suppress hearing that the police did not knock and announce before entering appellant=s residence. At trial, Bruce Houston testified that he had a battering ram that he used to try to open the door at the top of the outside stairs, but was unsuccessful (Tr. 279). Houston shouted Ahighway patrol@ as he hit the door (Tr. 280). Since Houston was unable to gain entry with the battering ram, he then broke the glass out and went through the window instead (Tr. 279). Houston said he used the battering ram because the officers were worried about possible gunfire coming from the residence (Tr. 281). Houston was asked to explain his fear but defense counsel raised an objection and the court told the prosecution to Ago on to something else.@ (Tr. 282).

Shouting Ahighway patrol@ while hitting the door with a battering ram is probably not what was contemplated by the U.S. Supreme Court and the common law in requiring the police to knock and announce their presence before entering into a residence.. In any event, appellant has not proven that the police were not justified in making a no-knock entry, the burden being on appellant as he failed to timely raise the claim. ***See Galazin, supra.*** Furthermore, the police were justified in making a no-knock entry in this particular case and thus the trial court did not err in overruling appellant=s motion to suppress.

Sgt. Wingo testified at the hearing on the motion to suppress that he was in fear of bodily harm from appellant in executing the search warrant, in light of appellant=s past violent, erratic, paranoid behavior in past contacts with law enforcement (Tr. 77). Appellant was known to have brandished weapons to citizens (Tr. 78). During trial, Ofc. Bruce Houston testified that they were worried about possible gunfire coming from the residence and that appellant was Apossibly dangerous@ (Tr. 281, 296). Houston testified that the officers had Ahad dealings with [appellant] several times.@ (Tr. 299).

Appellant argues in his point relied on that Ano showing had been made prior to issuance of the warrant@ as to the existence of exigent circumstances which would justify a no-knock search. It is not necessary, however, for such facts to exist *before the issuance of the warrant*. Whether or not the police may dispense with the knock and announce requirement is determined by an evaluation of the circumstances as of the time the police entered the building in question. ***Richards v. Wisconsin***, 117 S.Ct. at 1422. Even where warrants do not expressly have a no-knock provision, officers may execute a warrant without knocking and announcing where exigent circumstances justify such an action. ***U.S. v. Mack***, 117 F.Supp.2d 935, 943 (W.D.Mo. 2000). And as explained above, exigent circumstances in this case did exist in light of law enforcement=s prior knowledge and contact with appellant and knowledge of his paranoia and his brandishing of weapons.

In sum, then, appellant affirmatively waived this claim when he announced Ano objection@ when all of the evidence in question was offered. He further waived this claim by failing to raise it specifically in his motion to suppress and instead not raising it until immediately prior to trial. Appellant failed to meet his burden of proving that the police were not justified in engaging in a Ano-knock@ search and, in any event,

exigent circumstances existed to warrant such a search in light of appellant=s past violent, paranoid behavior and brandishing of weapons. Appellant=s point is without merit and should be denied.

II.

APPELLANT AFFIRMATIVELY WAIVED HIS CLAIM THAT THE TRIAL COURT ERRED IN ADMITTING EVIDENCE DISCOVERED AT APPELLANT=S RESIDENCE BECAUSE APPELLANT STATED ANO OBJECTION@ WHEN THIS EVIDENCE WAS OFFERED AT TRIAL. IN ANY EVENT, THE TRIAL COURT DID NOT ERR, PLAINLY OR OTHERWISE, IN ADMITTING INTO EVIDENCE PHOTOGRAPHS OF THE ITEMS DISCOVERED AT APPELLANT=S RESIDENCE BECAUSE THIS EVIDENCE WAS NOT THE FRUIT OF AN ILLEGAL SEARCH IN THAT THE SEARCH WARRANT WAS BASED ON PROBABLE CAUSE. FURTHERMORE, EVEN IF THE SEARCH WARRANT WAS INVALID, THE POLICE ACTED IN GOOD FAITH ON THE WARRANT, AND THUS EXCLUSION OF THE EVIDENCE WOULD HAVE BEEN INAPPROPRIATE.

Appellant contends that the trial court erred in admitting evidence discovered at appellant=s residence because, according to appellant, the search warrant which led to discovery of the evidence was faulty in that there was no probable cause to support issuance of the warrant.

A. Appellant has affirmatively waived his claim.

Appellant claims that the trial court erred in admitting evidence seized in the search of his residence. However, while appellant initially made a continuing objection during opening statements to the evidence in question, he affirmatively waived his claim by announcing Ano objection@ to all of the evidence when it was introduced at trial (Tr. 286, 349-350, 351-353). An announcement of Ano objection@ amounts to an affirmative waiver of appellate review of the issue. ***State v. Burge***, 39 S.W.3d 497, 499 (Mo.App.S.D.

2000).***See also State v. Starr***, 492 S.W.2d 795, 801 (Mo.banc 1973); ***State v. Simone***, 416 S.W.2d 96, 100-101 (Mo.1967); ***State v. Holt***, 415 S.W.2d 751, 765 (Mo. 1967); ***State v. Markham***, 63 S.W.3d 701, 707 (Mo.App.S.D. 2002); ***State v. Patino***, 12 S.W.3d 733, 740 (Mo.App.S.D. 1999); ***State v. Morrow***, 996 S.W.2d 679, 682 (Mo.App.W.D. 1999); ***State v. Cardona-Rivera***, 975 S.W.2d 200, 203 (Mo.App.S.D. 1998); ***State v. Atchison***, 950 S.W.2d 649, 654 (Mo.App.S.D. 1997); ***State v. Stevens***, 949 S.W.2d 257, 258-259 (Mo.App.S.D. 1997); ***State v. Rush***, 949 S.W.2D 251, 257 (Mo.App.S.D. 1997); ***State v. Weston***, 912 S.W.2d 96, 101 (Mo.App.S.D. 1995); ***State v. McBane***, 904 S.W.2d 548, 551 (Mo.App.W.D. 1995); ***State v. Funke***, 903 S.W.2d 240, 244 (Mo.App.E.D. 1995); ***State v. Zelinger***, 873 S.W.2d 656, 660 (Mo.App.S.D. 1994); ***State v. Scott***, 858 S.W.2d 282, 285 (Mo.App.W.D. 1993); ***State v. Anthony***, 837 S.W.2d 941, 944 (Mo.App.E.D. 1992); ***State v. Daly***, 798 S.W.2d 725, 729 (Mo.App.W.D. 1990); ***State v. Bolden***, 799 S.W.2d 122, 123 (Mo.App.W.D. 1990); ***State v. Meyers***, 770 S.W.2d 312, 314 (Mo.App.W.D. 1989); ***State v. Ealey***, 727 S.W.2d 165, 167 (Mo.App.W.D. 1987); ***State v. Adams***, 552 S.W.2d 53 (Mo.App.K.C.D. 1977); ***State v. Day***, 531 S.W.2d 780, 782 (Mo.App.K.C.D. 1975); ***State v. Hunter***, 530 S.W.2d 432, 433 (Mo.App.K.C.D. 1975).

Appellant has not filed a substitute appellate brief in this matter. However, in his motion for transfer to this Court, he cites to ***State v. Stillman***, 938 S.W.2d 287 (Mo.App.W.D. 1997), wherein the Court of Appeals, Western District, reviewed the defendant=s claim despite the fact that counsel had said Ano objection@ when the evidence came in. As in the present case, the attorney in ***Stillman*** had raised the issue in a pretrial hearing and had renewed the objection during the testimony of the witnesses in question, but when the exhibits were actually offered into evidence, defense counsel said Ano objection.@ ***Id.*** at 289-

290. The Court of Appeals, Western District, acknowledged that the Aestablished rule in Missouri holds that stating >no objection= when evidence is introduced constitutes an affirmative waiver of appellate review of the issue.@ ***Id.*** (citations omitted). The Court of Appeals, Western District, however, decided that the trial court and opposing counsel understood that defense counsel did not mean to waive the record he had made on the motion to suppress and that to then find a waiver and deny review would be a Ahypertechnical application@ of the requirement of renewing the objection at every stage.

Appellant, in his motion for transfer to this case, also cites to ***State v. Curtis***, 931 S.W.2d 493 (Mo.App. 1996), on which ***Stillman*** relied. In ***Curtis***, defendant had raised a motion to suppress and asked for a continuing objection prior to trial, yet announced Ano objection@ when the drugs at issue were offered into evidence. ***Id.*** at 494-495. Again, the Court of Appeals, Western District, decided that Athe trial court and opposing counsel understood that counsel did not intend to waive@ the record made on the motion to suppress and thus reviewed the defendant=s claim on direct appeal. ***Id.*** at 495.

In his transfer motion, appellant also cites to this Court=s decision in ***State v. Wurtzburger,*** 40 S.W.3d 893 (Mo.banc 2001), which appellant says Aquestion[s] the concept of waiver of plain error review.@ (Transfer Mot. at 1, 5). In ***Wurtzburger***, defense counsel not only failed to object to an instruction, but specifically told the court that he had no objection to the instruction in question. ***Id.*** at 897. The state argued that the defendant had waived all appellate review and that the Supreme Court was precluded from performing even plain error review, citing Rule 28.03 which requires counsel to make specific objections to instructions and states that no one may assign error regarding an instruction unless the party objects to the instruction before the jury retires. ***Id.*** at 897. This Court ultimately held that Rule

28.03 did not trump Rule 30.20, which allowed for plain error review, and thus this Court reviewed the defendant=s claim for plain error.

First of all, with reference to the Western District cases, ***Stillman*** and ***Curtis***, neither of these cases purports to overrule the longstanding rule that stating Ano objection@ constitutes a waiver. Indeed, the Court in ***Stillman*** expressly acknowledged that A[t]he established rule in Missouri holds that stating >no objection= when evidence is introduced constitutes an affirmative waiver of appellate review of the issue.@ ***Id.*** at 290 (citations omitted). Moreover, the Western District, since deciding both ***Stillman*** and ***Curtis*** has found a waiver where a defendant has stated Ano objection@ when the evidence in question was offered. ***See State v. Morrow***, 996 S.W.2d 679, 682 (Mo.App.W.D. 1999).

As for ***State v. Wurtzberger,*** this Court addressed itself to the question of whether Rule 28.03, which requires a specific objection to an instruction to preserve the claim for appellate review, trumped Rule 30.20 and precluded an appellate court from granting even plain error review. ***Id.*** at 897-898. ***Wurtzburger*** did not address the issue of what effect an announcement of Ano objection@ had as to appellate review. Moreover, ***Wurtzburger*** found the state was correct that the defendant had waived appellate review when his counsel failed to raise a specific objection. ***Id.*** at 898.

Thus, there is no question that stating Ano objection@ amounts to a waiver of appellate review and none of appellant=s cases cited in his transfer motion contradict this principle of law. The fact that the ***Stillman*** and ***Curtis*** courts reviewed defendant=s claim on appeal anyway does not mean there was not a waiver; it merely means that the Western District chose to exercise its discretion and review despite the waiver although, as will be discussed immediately below, no plain error could possibly be found.

Neither ***Stillman***, nor ***Curtis***, nor ***Wurtzburger*** *mandate* that a court grant plain error review where a defendant has affirmatively waived his claim by stating Ano objection.@ Indeed, completely aside from the question of whether an issue was affirmatively waived or not, the fact remains that granting plain error review is discretionary with the appellate court and need not be granted. "The 'plain error' rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." ***State v. Roberts***, 948 S.W.2d 577, 592 (Mo.banc 1997), *cert. denied,* 118 S.Ct. 711 (1998). "'[U]nless a claim of plain error facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted,' this Court will decline to exercise its discretion to review for plain error under Rule 30.20." ***Id., citing State v. Brown***, 902 S.W.2d 278, 284 (Mo.banc 1995), *cert. denied*, 516 U.S. 1031 (1995). Where a defendant has stated affirmatively on the record that he has Ano objection@ to the evidence, one would be hard put to state that the record Afacially establishes substantial grounds for believing manifest injustice of miscarriage of justice has resulted.@ Thus, even if an appellate court were to grant plain error review, actual plain error would not have resulted from the trial court doing as the defendant wished.

The bottom line is that if a defendant states Ano objection@ to evidence when it is offered, this constitutes a waiver of appellate review. Appellant=s cases do not say anything to the contrary. This waiver is sufficient grounds for an appellate court to decline reviewing the defendant=s claim, even for plain error, just as it is within the appellate court=s discretion to review the claim despite the waiver. In the present case, the appellate court declined to review the claim. Grounds existed to decline review in light of the fact that appellant had waived appellate review. Thus, the appellate court was well within its discretion to decline review.

B. Standard of review if reviewed.

While appellant=s affirmative waiver is grounds to deny any review whatsoever, this court may, in its discretion review appellant=s claim for plain error. "The 'plain error' rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." ***State v. Roberts***, 948 S.W.2d 577, 592 (Mo.banc 1997), *cert. denied*, 118 S.Ct. 711 (1998). Appellant must demonstrate that manifest injustice or a miscarriage of justice will occur if the error is not corrected. ***Id.*** "'[U]nless a claim of plain error facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted,' this Court will decline to exercise its discretion to review for plain error under Rule 30.20." ***Id., citing State v. Brown***, 902 S.W.2d 278, 284 (Mo.banc 1995), *cert. denied*, 516 U.S. 1031 (1995).

"Relief under the plain error standard is granted only when an alleged error so substantially affects a defendant's rights that a manifest injustice or miscarriage of justice inexorably results if left uncorrected. Appellate courts use the plain error rule sparingly and limit its application to those cases where there is a strong, clear demonstration of manifest injustice or miscarriage of justice. The determination of whether plain error exists must be based on a consideration of the facts and circumstances of each case. A defendant bears the burden of demonstrating manifest injustice or miscarriage of justice." ***State v. Varvera***, 897 S.W.2d 198, 201 (Mo.App., S.D. 1995) (citations omitted). Of course, it can hardly be said that the trial court=s decision to allow the evidence in was clearly erroneous, let alone a manifest injustice or miscarriage of justice, when appellant said he had Ano objection@ to the evidence.

In any event, a "[r]eview of a ruling on a motion to suppress is limited to a determination of whether sufficient evidence exists to sustain the ruling." ***State v. Solt***, 48 S.W.3d 677, 678-679 (Mo.App.S.D.

2001). This court must determine whether the judge issuing the search warrant had a substantial basis for concluding that probable cause existed. ***State v. Hawkins***, 58 S.W.3d 12, 22 (Mo.App.E.D. 2001). Review is not de novo because whether there was substantial basis for probable cause is a question of fact. ***Hawkins, supra.*** The reviewing court examines the four corners of the affidavits and gives great deference to the issuing judge=s determination of probable cause. ***Hawkins, supra.*** This court will reverse only if there was clear error in the trial court=s issuing of the search warrant. ***Id.*** Even cases where the sufficiency of the affidavit is marginal should be determined largely by the preference to be accorded to warrants. ***State v. Williams***, 9 S.W.3d 3, 17 (Mo.App.W.D. 1999).

C. There was probable cause to issue the search warrant.

Appellant, in challenging the affidavit underlying the search warrant in the case at bar, faults the affidavit because he states that the evidence therein constitutes uncorroborated hearsay or was provided by an informant who was not known to the affiant as being reliable or was stale in that it was of little value in showing that contraband or evidence was likely to be found in the place for which the warrant was sought (App.Br. 36). The pertinent parts of the affidavit which appellant faults are set out as follows:

> H. That the Family Center Store in Harrisonville, Missouri sells iodine crystals and assists law enforcement with the identification of individuals purchasing them. The Family Center Store formerly sold iodine crystals for $2.49 per two ounce jar. Since June, 1995, however, they have raised the price dramatically to a cost of $39.99 per four ounce jar, and $79.99 per eight ounce jar. Further, that on January 16, 1999, a subject identified as Gary L. Baker, a white male, date of birth November 1, 1955, giving an address of 1502 Leawood, Clinton, Missouri, purchased eight ounces of iodine crystals from the Family

Center store for the purchase of $79.99. I spoke with employees of the store who told me that Baker indicated to them that he was going to put them Aall over his horses@ in order to treat them. I spoke with Missouri State Highway Patrol Sergeant Pat Shay who told me that he had been receiving information that Baker was involved with the manufacture of methamphetamine and that he was not aware that Baker owned any horses.

I. That based on my experience and training, I am aware that ephedrine and pseudoephedrine are main precursors in the manufacture of methamphetamine. That these are frequently obtained by individuals manufacturing methamphetamine by purchasing large quantities of pills containing ephedrine and pseudoephedrine from stores. That on March 4, 1999, I spoke with West Central Drug Task Force Officer Amy Huber. TFO Huber told me that she had received information from an employee of the Wal-Mart store in Clinton, Missouri, about the purchase of pseudoephedrine pills from that store. This information specifically indicated that Gary L. Baker had just purchased six boxes of pseudoephedrine from the Wal-Mart store on that date. Baker was later contacted at his residence, 40B Swisher Drive, Clinton, Missouri, by TFO Huber and Missouri State Highway Patrol Sgt. Pat Shay. That Baker admitted to Sgt. Shay and TFO Huber that he had purchased the pseudoephedrine pills due to a serious sinus problem. Baker also admitted that he had left the pills at a friends house, although he was unable to remember the friends name or the location of the residence. Sgt. Shay and TFO Huber later developed information that Baker had left the pills at the residence of Sarah Brewer, located at 814 E. Green, Clinton, Missouri. Subsequent to a search warrant issued for the

residence on March 4, 1999, I assisted in the seizure of a non-operational methamphetamine laboratory at that residence. TFO Huber told me that she later interviewed Brewer at the Henry County Jail. TFO Huber told me that Brewer indicated that Baker had left the pills at her residence, and that Baker was in the process of learning how to manufacture methamphetamine.

J. That in December 1999, your affiant learned from Sgt. Shay that Gary L. Baker had moved his residence to 855 N. Highway 13, Clinton, Missouri.

K. TFO Huber further told me that she had received information from a female by the name of Samantha J. Chappell in July of 1999. TFO Huber told me that Chappell had indicated to her that she was the ex-girlfriend of Gary L. Baker and that prior to her breakup with Baker, she had observed Baker manufacturing methamphetamine at his residence at 40B Swisher Dr., Clinton, Missouri. On January 13, 2000, your affiant assisted in serving a search warrant at Chappell=s residence at Rt. 2 Box 246AE, Clinton, Missouri. A nonoperating methamphetamine laboratory was seized from the residence at that time. Chappell indicated to me at that time that Baker was still manufacturing methamphetamine at his residence on 13 Highway. Chappell developed this information because she had been purchasing chemicals for Baker for the manufacture of methamphetamine.

L. That on Friday, March 10, TFO Huber told me that she spoke with Keith Johnson who is the loss prevention coordinator with Wal-Mart in Clinton, Missouri. TFO Huber told me that according to Mr. Johnson, the Wal-Mart store in Clinton, Missouri had

taken notice of several unusual purchases made at the store during the period of late January 2000 through the middle of February 2000. That according to Mr. Johnson, Gary L. Baker would come to the store between the hours of 2:00 a.m. and 5:00 a.m., and purchase three bottles of hydrogen peroxide, two cans of acetone, and, on occasion several boxes of pseudoephedrine, every other evening for a two week period. I know based on my experience and training that acetone and hydrogen peroxide are both used in the manufacture of methamphetamine.

M. That based on my experience and training, I am aware that red phosphorous is a reagent chemical used in the manufacture of methamphetamine. That individuals illegally manufacturing methamphetamine frequently obtain the red phosphorous from the strike plates of match books. That because these strike plates contain a small amount of red phosphorous, large quantities of match books are purchased in order to obtain a sufficient quantity. TFO Huber also told me that she received information from Clinton Police Chief Rob Hyder on March 7, 2000, concerning Gary L. Baker. TFO Huber told me that Chief Hyder had received information from an individual with the Golden Valley Country Market Store in Clinton, Missouri, that Gary L. Baker was purchasing four boxes of matches, each containing 250 books of matches, from their store. That Baker had made the purchases of four boxes each of the previous two weekends. That on March 10, 2000, TFO Huber told me that she received a phone call again from Chief Hyder at 10:30 a.m. TFO Huber told me that Chief Hyder had just received information, from an individual with Golden Valley Country Market Store, that Gary L. Baker had just purchased four more boxes of

matches and was leaving the parking lot in a vehicle at that time. TFO Huber told me that she was near the location of the store and left immediately to the residence of Baker located at 855 N. Highway 13, Clinton, Missouri. She observed Baker exiting a vehicle in the driveway and walk to the residence.

(LF 19**B**22).

In his brief, appellant assails each separate paragraph of the affidavit. But the proper analysis of an affidavit supporting a search warrant is not to parse it paragraph by paragraph, line by line, statement by statement. The proper analysis of an affidavit is to look at the totality of the circumstances based on *all* of the circumstances set out in the affidavit to determine whether probable cause is present. ***State v. Williams***, 9 S.W.3d 3, 14 (Mo.App.W.D. 1999).

Probable cause is a fair probability that contraband or evidence of a crime will be found, which is to be determined from the totality of the circumstances. ***State v. Williams***, 9 S.W.3d 3, 14, (Mo.App.W.D. 1999). To make this determination, the judge must make a Apractical, common sense decision@ whether such a fair probability exists. ***Id.*** The decision is made from all of the circumstances set out in the affidavit, including the basis of knowledge and veracity of persons providing any hearsay information contained in the affidavits. ***Id.***

The determination of whether hearsay is creditable requires the judge to determine the veracity and basis of knowledge of the persons supplying the hearsay information. ***Williams, supra.*** Hearsay information in a search warrant affidavit from an ordinary citizen is more deserving of a presumption of reliability than are informants from the criminal world. ***Williams, supra***, at 15.

Appellant=s first general complaint is that the affidavit is based on uncorroborated hearsay. Many of the assertions in the affidavit are based on reports by store employees or other law enforcement officers. An affidavit which relies on hearsay is sufficient so long as there is substantial basis for crediting the hearsay. ***Williams, supra.*** Normally, to find hearsay reliable, it must be found to have been based on personal observation and be corroborated. ***Williams, supra.*** However, if the hearsay can be properly credited, there is no need to prove reliability. ***Williams, supra.***

The information which came from store employees, reporting that appellant had been purchasing large quantities of methamphetamine ingredients, is inherently reliable because it is information from common citizens with no incentive to fabricate. When the information upon which the warrant is based comes from one who claims to have witnessed a crime or to have been the victim of a crime, the information carries with it indicia of reliability and is generally presumed to be reliable. ***State v. Dawson***, 985 S.W.2d 941, 950 (Mo.App.W.D. 1999). Courts around the country at federal and state levels have consistently held that the proof-of veracity rules which are applied in informant cases are not applicable in cases where the source of the information has been characterized as a cooperative, concerned, average, or ordinary citizen, etc. 2 LaFave, Search and Seizure, ' 3.4(a) (1996) at 205-206. This is because such persons generally are not motivated by any gain or possible concession by the state in exchange for the information. 2 LaFave, Search and Seizure, ' 3.4(a) 1996) at 208. The prevailing view is that when an ordinary citizen=s report is based upon his personal observation, reliability may be shown Aby the very nature of the circumstances under which the incriminating information became known.@ 2 LaFave, Search and Seizure, ' 3.4(a) (1996) at 210. Thus, as Missouri courts have said, in such situations, the information carries with it indicia of reliability and is generally presumed to be reliable. ***State v. Dawson***, 985 S.W.2d 941, 950

(Mo.App.W.D. 1999). Hearsay information in a search warrant affidavit from an ordinary citizen is more deserving of a presumption of reliability than hearsay from an informant from the criminal world. ***State v. Dawson***, 985 S.W.2d 941, 950 (Mo.App.W.D. 1999). Therefore, the reports of the persons at Family Center Store, Wal-Mart, and Golden Valley Country Market Store could be presumed reliable.

As for the statements from the other law enforcement officers, A[C]ourts have consistently held that another law enforcement officer is a reliable source and that consequently no special showing of reliability need be made as a part of the probable cause determination.@ ***Williams,*** at 16, quoting ***State v. Dudley***, 819 S.W.2d at 54-55.

Furthermore, there was corroboration. For example, when the police first learned that appellant had been seen at Wal-Mart purchasing pseudo-ephedrine, they confronted him and he admitted buying the medication. He said that he had left it at a friend=s house but allegedly could not remember this friend=s name or address, indicating consciousness of guilt in that appellant was trying to cover up his actions. This was later corroborated when the police, having searched and found a non-working methamphetamine lab at the residence of Sarah Brewer, were informed by Brewer that appellant had left the pills at her home and that he was learning to manufacture methamphetamine. Statements that appellant was manufacturing methamphetamine were corroborated by reports that appellant was seen in various stores purchasing ingredients for manufacturing methamphetamine, and vice versa. When appellant was reported buying matches at the convenience store, Ofc. Huber immediately reported to his residence to find him arriving.

Corroboration of even part of the information furnished by an informant is sufficient to support a finding of probable cause. ***State v. Meyers***, 992 S.W.2d 246, 248 (Mo.App.E.D. 1999). And ultimately, the question of probable cause does not turn on whether or not any one particular bit of

information was corroborated. The question of probable cause turns on the totality of the circumstances and a practical, common sense examination thereof. ***State v. Williams, supra.*** In the case at bar, the totality of the circumstances as set forth in the lengthy affidavit to support the application for the search warrant demonstrates that several people over the course of several months reported that appellant was manufacturing methamphetamine and purchasing ingredients for the manufacture thereof. Much of this information came from ordinary citizens with no incentive to fabricate. In light of the reports of appellant=s purchases, his activities, and the fabrications he made to cover up his activities (putting iodine Aall over@ his horses that he did not have, dropping off cold pills that he needed for his sinus infection at the house of a friend whose name and address he could not remember), common sense dictates that there was probable cause - - a fair probability that contraband or evidence of a crime would be found at appellant=s residence. ***State v. Williams***, 9 S.W.3d 3, 14, (Mo.App.W.D. 1999).

Appellant also alleges that some of the information in the affidavit is stale in that it refers to incidents as long as 14 months prior to execution of the search warrant. A similar claim was raised in ***State v. Williams***, 9 S.W.3d 3, 16 (Mo.App.W.D. 1999), where the defendant argued that the detective=s knowledge of his past criminal drug activity was too stale and attenuated to be considered in establishing probable cause. ***Id.*** at 16. The Court of Appeals, Western District, held that while such information was not sufficient in and of itself, such information was not too stale to be considered, along with all the other relevant circumstances, to determine whether there was a fair probability that Williams was presently engaged in criminal narcotic activity. ***Id.*** at 17. A suspect=s past criminal behavior can be considered in determining whether probable cause exists to justify a search. ***State v. Williams***, 9 S.W.3d 3, 16 (Mo.App.W.D. 1999). Thus, in the present case, the evidence that appellant had been seen purchasing

ingredients for methamphetamine as long as 14 months before the search could be considered among the totality of circumstances in determining whether to issue the search warrant. ***See also State v. Bordner***, 53 S.W.3d 179 (Mo.App.W.D. 2001) (old reports that defendant involved in drug trade Aupdated@ by new information and are part of totality of circumstances).

D. Good-faith exception.

Finally, even if the search warrant was invalid, exclusion of the evidence obtained in the warrant=s execution is not called for. A[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.@ ***United States v. Leon***, 468 U.S. 897, 104 S.Ct 3405, 3417, 82 L.Ed.2d 677 (1984). Where law enforcement officers act in reasonable reliance on a facially valid search warrant issued by a detached and neutral magistrate, the exclusionary rule will not operate to bar evidence obtained under that search warrant, despite the fact that said warrant may ultimately be found invalid. ***Leon***, 104 S.Ct. at 3418-3419. The exclusionary rule will operate to suppress evidence only if the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. ***State v. Williams***, ***supra***.

In the present case, there is nothing to indicate that the officers were not acting in good faith reliance upon the warrant. The affidavit was not so lacking in indicia of probable cause as to render belief in the validity of the search warrant unreasonable. Since the officers in good faith relied upon the warrant in executing their search, any mistake the judge may have made in finding there to be probable cause is not sufficient to justify excluding the evidence the officers seized while executing the warrant in good faith.

In sum, then, appellant waived review of this claim by stating Ano objection@ when the evidence was offered into the record. In any event, the trial court did not err in refusing to exclude the evidence obtained

under the search warrant because the search warrant was valid in that it was based on an affidavit which demonstrated probable cause that contraband would be found at appellant=s residence. Even if the affidavit were insufficient, the officers acted in good-faith reliance on the warrant, and under ***United States v. Leon***, exclusion of the evidence would have been inappropriate. Appellant=s claim, if reviewed, is without merit and should be denied.

III.

THE TRIAL COURT DID NOT PLAINLY ERR WHEN IT DID NOT ACT *SUA SPONTE* TO DISALLOW FILING OF THE STATE=S SECOND AMENDED INFORMATION, WHICH SUBMITTED SEVERAL CHARGES IN THE DISJUNCTIVE IN ONE COUNT, BECAUSE APPELLANT FAILED TO OBJECT TO THE INFORMATION UNTIL AFTER THE VERDICT AND APPELLANT HAS FAILED TO SHOW ANY ACTUAL PREJUDICE FROM THE INFORMATION IN THAT HE HAS NOT SHOWN HOW IT PREJUDICED HIS DEFENSE OR THAT IT PREVENTS HIM FROM ASSERTING DOUBLE JEOPARDY IN THE EVENT OF FUTURE CHARGES ARISING FROM THE SAME INCIDENT.

Appellant contends that the trial court erred in allowing the state to file its second amended information because the amended information purportedly failed to charge an offense.

The second amended information read, in pertinent part, as follows:

> The Prosecuting Attorney . . . charges that the defendant, in violation of Section 195.420, RSMo, committed the class C felony of possession of a chemical with the intent to create a controlled substance, . . . in that on or about March 10, 2000, in the County of Henry, State of Missouri, the defendant knowingly possessed methanol or hydrogen peroxide or lighter fluid or naphtha or muriatic acid or pseudoephedrine or ephedrine or acetone and other solvents proven to be precursor ingredients of methamphetamine, with the intent to convert, process or alter one of those chemicals to create methamphetamine, a controlled substance.

(LF 12).

Appellant faults the information because it charges the various chemicals disjunctively, and possession of any one of those chemicals constitutes a violation of ' 195.420, and thus possession of each chemical would constitute a separate and distinct offense (App.Br. 49). Appellant cites to ***State v. Barr***, 34 S.W.2d 477 (Mo. 1930) and ***State v. Hook***, 433 S.W.2d 41 (Mo.App.W.D. 1968) for the proposition that the information fails to charge any offense at all because of the disjunctive submission, and he asserts that he is in the same position as the defendants in ***Barr*** and ***Hook***. In ***Barr***, the state charged the defendant with selling hootch, moonshine, or corn whisky. In ***Hook***, the state charged the defendant with inducing or attempting to induce a witness to absent herself or to avoid subpoena or to withhold evidence or with deterring her or attempting to deter her from appearing and giving evidence in a criminal case, thereby charging the defendant with each and every act prohibited by the statute in question.

In the case at bar, appellant is correct that the state should not have disjunctively charged possession of each chemical in a single count, as possession of each chemical constitutes a violation of the statute unto itself. However, appellant is not in the same position as the defendants in ***Barr*** and ***Hook,*** both of which predate ***State v. Parkhurst***, 845 S.W.2d 31 (Mo.banc 1992), which governs, because in the case at bar, the record does not reflect that appellant objected to this second amended information.

When an objection to an information is raised for the first time after the verdict has been rendered, the information will be deemed insufficient only if it is so defective that it does not by any reasonable construction charge the offense of which the defendant was convicted or substantial rights of the defendant to prepare a defense and plead former jeopardy in the event of an acquittal are prejudiced. ***State v.***

Parkhurst, 845 S.W.2d 31, 35 (Mo.banc 1992). In either event, a defendant will not be entitled to relief unless the defendant demonstrates actual prejudice. ***Id.***

Appellant contends that the faulty information prejudiced his ability to prepare his defense and prejudiced his ability to plead former jeopardy in the event additional charges should arise out of this same incident. Appellant has not demonstrated any actual prejudice, however. He states that the information prejudiced him in preparing his defense to the charges (App.Br. 51), but does not explain how or in what way he was prejudiced. Appellant=s defense was not that he did not possess the chemicals or that the chemicals were not what the state claimed them to be. His defense was that he did not possess those chemicals with the intent to manufacture methamphetamine in that there was no evidence that he was making methamphetamine and that the chemicals were present in the building for legitimate legal purposes, such as stripping paint and cleaning drains (Tr. 187-191, 196-197, 453-473). This defense was not prejudiced by the disjunctive submissions in the second amended information. Furthermore, even if the state had charged possession of only one chemical, e.g., hydrogen peroxide, appellant would have had to present the same defense as he would have to have been prepared to explain away all of the uncharged chemicals because evidence of the other chemicals would have come in as evidence of appellant=s intent to manufacture methamphetamine, in that he had other ingredients there. ***See, e.g., State v. Condict***, 65 S.W.3d 6, 16 (Mo.App.S.D. 2001). Thus, the fact that the information disjunctively charged all of the chemicals in one count, as opposed to just one chemical, had no actual effect on appellant=s defense.

Appellant also complains that the disjunctive submission in the second amended information violated his double jeopardy rights because he allegedly would be unable to plead double jeopardy in the event of a second trial after an acquittal or conviction in that he could not know the exact offense with which he had

been charged in the case at bar (App.Br. 52). By way of example, appellant hypothesizes that if the state should subsequently charge him with possession of hydrogen peroxide on the same date as that in the present case, appellant allegedly could not claim double jeopardy because he does not know that he was charged and convicted of possessing hydrogen peroxide, in light of the fact that hydrogen peroxide was one of several chemicals charged disjunctively in the amended information in the case at bar (App.Br. 53).

Appellant cites no authority that supports his assertion that the amended information in the case at bar would prevent him from claiming double jeopardy if the state should try to charge him again for possession of any of the chemicals in question in this particular incident. In fact, appellant would be able to successfully claim double jeopardy if the state tried to charge him again. If, for example, the state were to subsequently charge that on March 10, 2000, appellant possessed hydrogen peroxide with the intent to convert it into methamphetamine, appellant would only have to point to the second amended information in the present case to demonstrate that he had already been tried for possession of hydrogen peroxide. Because of the state=s own gaffe in having previously charged all of the chemicals in one count, it would be impossible for the state to later prove that appellant was not already prosecuted and convicted for possession of hydrogen peroxide.

In short, then, the second amended information did not prejudice appellant=s substantial rights to prepare a defense or his rights to plead former jeopardy. Appellant has failed to show any actual prejudice and thus is not entitled to any relief. His claim should be denied.

IV.

THE TRIAL COURT DID NOT PLAINLY ERR IN SUBMITTING THE STATE=S VERDICT DIRECTOR, INSTRUCTION NO. 6, BECAUSE THE DISJUNCTIVE SUBMISSION OF NUMEROUS CHEMICALS DID NOT RESULT IN MANIFEST INJUSTICE TO APPELLANT IN THAT THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT APPELLANT DID POSSESS ALL THE CHEMICALS SUBMITTED WITH THE INTENT TO USE THE CHEMICALS TO MAKE METHAMPHETAMINE.

Appellant asserts that the trial court erred in submitting the state=s verdict director because, as written, the verdict director allowed the jury to find appellant guilty without agreeing as to what chemical it was that appellant possessed.

Appellant did not object to this instruction at trial. Therefore, his claim is reviewable only for plain error. "The 'plain error' rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." ***State v. Roberts***, 948 S.W.2d 577, 592 (Mo.banc 1997), *cert. denied,* 118 S.Ct. 711 (1998). Appellant must demonstrate that manifest injustice or a miscarriage of justice will occur if the error is not corrected. ***Id.*** "'[U]nless a claim of plain error facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted,' this Court will decline to exercise its discretion to review for plain error under Rule 30.20." ***Id., citing State v. Brown***, 902 S.W.2d 278, 284 (Mo.banc 1995), *cert. denied*, 516 U.S. 1031 (1995).

"Relief under the plain error standard is granted only when an alleged error so substantially affects a defendant's rights that a manifest injustice or miscarriage of justice inexorably results if left uncorrected.

Appellate courts use the plain error rule sparingly and limit its application to those cases where there is a strong, clear demonstration of manifest injustice or miscarriage of justice. The determination of whether plain error exists must be based on a consideration of the facts and circumstances of each case. A defendant bears the burden of demonstrating manifest injustice or miscarriage of justice." ***State v. Varvera***, 897 S.W.2d 198, 201 (Mo.App., S.D. 1995) (citations omitted).

The instruction at issue read, in pertinent part, as follows:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about March 10, 2000, in Henry County, Missouri, the defendant possessed methanol or hydrogen peroxide or lighter fluid or naphtha or muriatic acid or pseudoephedrine or ephedrine or acetone, and
>
> Second, that the defendant was aware of its presence and nature, and
>
> Third, that the defendant did so with the intent to convert, process or alter methanol or hydrogen peroxide or lighter fluid or naphtha or muriatic acid or pseudoephedrine or ephedrine or acetone to create methamphetamine, a controlled substance.
>
> then you will the defendant guilty of possession of a chemical with the intent to create a controlled substance.
>
> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, the term Apossessed@ means either actual or constructive possession of a substance. A person has actual possession if he has the substance on his person or within easy reach and convenient control. A person who is not in actual possession has constructive possession if he has the power and intention at a given time to exercise dominion or control over the substance either directly or through another person or persons. Possession may also be sole or joint. If one person alone has possession of a substance, possession is sole. If two or more persons share possession of a substance, possession is joint.

As used in this instruction the term >controlled substance@ includes methamphetamine.

(SLF 7).

The verdict form read as follows:

We, the jury, find the defendant Gary Lynn Baker guilty of possession of a chemical with the intent to create a controlled substance as submitted in Instruction No. 6.

(SLF 10).

Appellant faults these instructions because they allowed the jury to find that he possessed one or more listed chemicals with the intent to create a controlled substance without stating which chemical appellant was found to have possessed (App.Br. 57). Because the jury was not required to specify a chemical, appellant asserts that it is not possible to determine whether all of the jurors found him guilty for possession of the same chemical (App.Br. 57). Thus, appellant asserts, he has been deprived of his right to be found guilty with respect to one definite crime by all twelve jurors (App.Br. 58).

The disjunctive submission of an element of an offense in a single instruction can present an issue of unanimity. ***State v. Mackey***, 822 S.W.2d 933, 936 (Mo.App.E.D. 1991) *citing* ***State v. Brigham,*** 709 S.W.2d 917, 922 (Mo.App. 1986). "To overcome the problem of the jury returning a non-unanimous verdict, disjunctive submissions of acts, especially those which constitute the gravamen of the offense, should be curtailed." ***Mackey, supra***, at 936.

In the case at hand, the disjunctive submission of the Instruction of the numerous chemicals was improper; however, under the facts of this case, manifest injustice did not result under the plain error rule. Plain error **–** that is, manifest injustice or miscarriage of justice **–** cannot be found where the evidence supports any and all of the disjunctive submissions.

For example, in ***State v. Mackey***, the instruction at issue erroneously submitted disjunctive acts of sodomy; however, the Court of Appeals found no plain error where there was sufficient evidence presented at trial from which a jury could find that the defendant did commit the two distinct acts constituting deviate sexual intercourse. ***Id.*** at 936.

Similarly, in the present case, appellant made no objection to the instruction (Tr. 438-40). There was sufficient evidence presented at trial from which a jury could find that appellant possessed each and every chemical submitted in the instruction and that he intended to use these chemicals to make methamphetamine (Tr. 358-59). All of the chemicals were found, along with equipment for making methamphetamine and weapons and ammunition, appellant knew how to manufacture methamphetamine, and appellant demonstrated consciousness of guilt by hiding in the attic of the building when the police entered.

Appellant cites to ***State v. Puig***, 37 S.W.3d 373 (Mo.App.S.D. 2001), in which the Court of Appeals, Southern District, found an instruction erroneous where it stated disjunctive means by which the defendant may have aided in the selling of marijuana (App.Br. 59-60). However, ***Puig*** is distinguishable because in ***Puig***, the Court of Appeals, Southern District, found the instruction prejudicial in that while there was evidence to support that defendant aided another party, the evidence was insufficient to support a theory that the defendant Aacted together with@ the seller in that there was no evidence that defendant, by any of his own acts, committed any of the conduct elements of the offense. 37 S.W.3d at 377-378.

Such a problem is not present in the instant case because there is evidence to support a finding that appellant possessed all of the chemicals set out in the instruction and that he intended to convert, process, or alter those chemicals to create methamphetamine.

Thus, while the instruction should not have submitted the chemicals in the disjunctive, it did not result in manifest injustice to appellant as there was sufficient evidence to support a conviction as to any and all of the chemicals set out in the instruction. Appellant=s point is therefore without merit and should be denied.

V.

THE TRIAL COURT DID NOT PLAINLY ERR IN SUBMITTING THE STATE=S VERDICT DIRECTOR, INSTRUCTION NO. 6, AND THE VERDICT FORM, INSTRUCTION NO. 9, BECAUSE THESE INSTRUCTIONS DO NOT VIOLATE APPELLANT=S RIGHT TO BE FREE FROM DOUBLE JEOPARDY IN THE EVENT OF FUTURE PROSECUTIONS FOR POSSESSION OF CHEMICALS ARISING FROM THIS INCIDENT.

Appellant contends that the disjunctive submissions of the verdict director have violated his double jeopardy rights because it Amake[s] it impossible for Appellant to have the protections from further prosection [sic] which the principles of double jeopardy should afford him.@ (App.Br. 63).

Appellant, in his argument section, does not explain how the disjunctive submissions in the verdict director allegedly make it impossible for him to have the protections for further prosecution (App.Br. 63). He does cite to his argument in Point IV, which he claims deals with how the disjunctive charges in the second amended information violate his double jeopardy rights (App.Br. 62), but Point IV does not deal with that issue. Respondent assumes that appellant means Point III, in which he challenges the sufficiency of the second amended information.

In Point III, appellant argues that the information did not allow him to know the exact offense with which he had been charged so as to be able to plead former jeopardy in the event of an acquittal or conviction (App.Br. 52). In that point, appellant posits that since he does not know which chemical he was actually convicted of possessing, the state could come back and charge him again with possession with one

of the chemicals and appellant would allegedly have no way of claiming double jeopardy (App.Br. 53). Appellant cites no authority for this double jeopardy argument.

This present point is simply a rehashing of the argument appellant already raised in Point III. And, as respondent already explained in Point III, appellant has no cause for complaint on the grounds of double jeopardy because he would be able to successfully assert double jeopardy if the state should charge him again based on this incident.

Since appellant=s claim is without merit, this point on appeal should be summarily denied.

CONCLUSION

In view of the foregoing, respondent submits that appellant=s conviction and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) of this Court and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 6 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of August, 2002.

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